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No. 690

FILED
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JOHN T. BROWNING, Clerk

In the Supreme Court of the United States

October Term, 1959

JOHN W. PORTER, JR., and JNO. W. PORTER, also known as JOHN W. PORTER, both individually and as sole partners doing business as the law firm of PORTER & PORTER, *Petitioners*,

vs.

OKLAHOMA BACONE COLLEGE TRUST, JOHN BROWN UNIVERSITY, TEXAS CHRISTIAN UNIVERSITY, TEXAS WESLEYAN COLLEGE, UNIVERSITY OF TEXAS, TEXAS A. & M. COLLEGE, SOUTHERN METHODIST UNIVERSITY, BAYLOR UNIVERSITY, OKLAHOMA A. & M. COLLEGE now Oklahoma State University, UNIVERSITY OF OKLAHOMA, THE GENERAL BOARD OF EDUCATION OF THE METHODIST CHURCH OF NASHVILLE, TENNESSEE, FIRST NATIONAL BANK IN DALLAS as Independent Executor of the Estate (in Texas) of Murray Case Sells, deceased, THE FIRST NATIONAL BANK AND TRUST COMPANY of Muskogee as Administrator with Will and Codicil annexed of the Estate (in Oklahoma) of Murray Case Sells, deceased, BRUCE BENNETT, as Attorney General of the State of Arkansas, MAC Q. WILLIAMSON as Attorney General of The State of Oklahoma, and WILL WILSON as Attorney General of the State of Texas, *Respondents*.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI FROM THE SUPREME COURT OF THE STATE OF OKLAHOMA.

A. CARL ROBINSON,
JULIAN B. FITE,
Muskogee, Oklahoma,
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March, 1960.

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RESPONSE TO PETITION FOR WRIT OF CERTIORARI FROM THE SUPREME COURT OF THE STATE OF OKLAHOMA.

To: The Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The Respondents, above named, with the exception of The First National Bank and Trust Company of Muskogee, as Administrator with Will and Codicil annexed of

the Estate (in Oklahoma) of Murray Case Sells, deceased, respectfully show to this Honorable Court, that the petition for writ of certiorari filed herein should be denied. Since the statement of the case in the petition filed is more than a little garbled because of the interspersed opinions and arguments, the Respondents will make a brief statement of the case, followed by a restatement of the issues involved, and an argument as to why this Court should not assume jurisdiction and grant the writ of certiorari. We shall not in this response attempt to argue the merits of this cause, except as to jurisdiction. For purposes of clarity we shall refer to the Petitioners as "the Porters" and the Respondents as "the Colleges" the "Attorneys General of Texas, Oklahoma, and Arkansas" and the "Independent Executor."

Statement of the Case.

Murray Case Sells accumulated an estate of some ten million dollars. For some years he lived in Muskogee, Oklahoma. Subsequently he removed to the State of Texas. At the time of his death he resided in Gregg County, Texas. The great bulk of his estate was in the form of stock in a corporation, Sells Petroleum Company, of which he was, in effect, the sole stockholder. In addition, he owned a relatively small amount of real estate and tangible personal property in the State of Texas. His personal property, consisting of stocks and his tangible personal property, and his Texas real state were subject to administration in the State of Texas. In addition, he left some real estate in the State of Oklahoma of the value of around $80,000.00, and a small amount of real estate in the state of Missouri.

Mr. Sells left a Will and a Co'icil to that Will dated some several months apart. The Will and Codicil were presented for and admitted to probate in the County Court of Gregg County, Texas, the domiciliary probate court having jurisdiction of his estate. Because of the existence of real estate in Oklahoma and in Missouri, ancillary probate proceedings were commenced in those two States. The Will and Codicil were admitted to probate in Oklahoma under the Oklahoma law allowing a certified copy of a Will and the probate thereof in the domiciliary jurisdiction to be admitted to probate in Oklahoma. Both the Will and the Codicil named The First National Bank in Dallas, Texas, as independent executor, and it was duly appointed Independent Executor by the County Court of Gregg County, Texas. This Bank being unable to act as Executor under the laws of the State of Oklahoma, an ancillary administrator with Will and Codicil annexed was appointed in Oklahoma, The First National Bank & Trust Company of Muskogee, Oklahoma.

In Texas there developed a will contest. An alleged heir contested both the Will and the Codicil on the ground that the testator lacked mental capacity. The Independent Executor settled this contest. Then later a second will contest developed. Two heirs contested both the Will and the Codicil on the ground that the testator at the time of execution of these documents lacked mental capacity. Citation was duly issued and served upon the Independent Executor as provided by Texas law.

The Will, aside from some rather minor specific bequests, provided that Mr. Sells' estate should go to establish ten trusts in varying proportions for providing for

student loan funds in the ten colleges which are respondents herein, and for building funds for two of the colleges. The Colleges themselves were made the administrators for the trusts relative to loan funds for students at the respective Colleges. Substantially the same distribution was made in the Codicil; however, the administration of the funds was changed. An overall trust was established with The First National Bank in Dallas, Texas, as the Trustee, and the respective Colleges were given subordinate powers as to allocating the funds going to provide for student loans to students in the respective Colleges (the proportions being the same as the separate trusts under the Will) and as to the building funds with respect to the two Colleges. The Colleges, as interested parties, intervened in the Will contest proceeding and the Attorneys General of the States of Texas, Oklahoma and Arkansas, wherein are located all of the Colleges involved, intervened in their capacities as general supervisors of charitable trusts within their respective states.

A settlement was worked out amongst the contestants, the Independent Executor, the Attorneys General and the Colleges. The Will contest proceeding was duly placed at issue, and trial was had. At this trial attorneys appeared on behalf of the contestants, the Independent Executor and the Colleges. Among the attorneys appearing was John W. Porter, Sr., one of the law firm who are the petitioners herein. Evidence was introduced, which evidence indicated that at the time of the execution of the Will Mr. Sells had testamentary capacity, but that at the time of the execution of the Codicil Mr. Sells' mental

condition had so deteriorated that he no longer had testamentary capacity. A judgment was prepared by agreement amongst all of the attorneys upholding the Will and finding the Codicil invalid. The Court, fully realizing that a settlement had been effected, caused each of the attorneys to be polled in open court as to their agreement with the terms of the proposed judgment. Amongst those polled was John W. Porter, Sr., who was asked and replied as follows:

> "Mr. Erisman: Mr. Porter, do you individually and in your representative capacity, do you recommend this settlement and do you agree to be bound thereby and waive the right to appeal?
>
> "Mr. Porter: In view of all of the facts and circumstances and the evidence introduced, I do."

Substantially the same questions were asked and the same answers given by each of the other attorneys present. The Court then signed the judgment. No appeal was had and the judgment became final.

While these proceedings were being conducted in the State of Texas, the ancillary proceedings in the State of Oklahoma had been completed. The property, as directed in the Will, had all been reduced to cash and was held by the ancillary administrator for distribution. The ancillary administrator had filed its final account and the final account had been approved. After the conclusion of the Texas proceedings, distribution was had in Texas and the Colleges sought distribution of the proportionately small estate remaining in Oklahoma. They sought to have this estate distributed under the Will, exclusive of the Codicil, the same as had been done with the great

bulk of the estate in Texas, on the ground that the Codicil having been declared invalid in Texas, it was likewise invalid in Oklahoma, and, likewise, because a distribution of the relatively small estate in Oklahoma differently from the distribution of the large estate in Texas would be infeasible. All of the specific bequests had been paid in Texas, so that only the residuary beneficiaries under the Will and Codicil were concerned with the Oklahoma estate.

All of the residuary beneficiaries entered their appearance in the cause, as did also the Attorneys General from the States of Texas, Oklahoma and Arkansas, and the Independent Executor and the Ancillary Administrator, and, likewise, the Porters. The Porters resisted the distribution as prayed. Trial was had in the County Court of Muskogee County, the probate court administering the Oklahoma estate, and distribution was directed under the Will exclusive of the Codicil. The Porters appealed this cause to the District Court of Muskogee County. A second trial was had and the order of distribution entered by the County Court of Muskogee County was affirmed. The Porters then appealed to the Supreme Court of the State of Oklahoma.

Because the distribution as prayed involved a trust, possibly without the jurisdiction of the probate courts under the laws of the State of Oklahoma, a plenary cause in equity was commenced by the Colleges in the District Court of Muskogee County, Oklahoma, the Court having general equity jurisdiction. In this cause all the beneficiaries of the residuary estate named in Mr. Sells' Will and

the Codicil thereto were joined as parties, together with the Attorneys General of the States of Texas, Oklahoma and Arkansas, as general overseers of charitable trusts within their respective states. The Porters, the Independent Executor, and the Ancillary Administrator were also made parties. In this cause it was prayed that the Codicil to the Will be declared to be inoperative since it had been declared invalid in the domiciliary jurisdiction, Texas. Also, because it would be infeasible to administer the trust provided for in the Codicil as to the relatively small estate in Oklahoma, the Court was requested to apply the doctrine of approximation and direct that the Oklahoma estate be added to the great bulk of the estate distributed in Texas and added to the trusts provided for in the Will. The Porters answered, asserting the validity of the Codicil. They filed a number of cross-petitions, seeking damages in large sums and a re-collection of the estate distributed in Texas, and that such re-collected estate be administered under the Codicil. They also sought attorney fees allegedly due them from the Independent Executor relative to the Texas proceedings. (Attorney fees had been duly allowed and paid to the Porters as to the Oklahoma proceedings by the County Court of Muskogee County in the ancillary probate matter.)

This last cross-petition the Court dimissed as not being germane to the issues and the cause proceeded to trial as to the principal cause and the cross-petitions of the Porters. The Court found that the Codicil, having been declared invalid in the domiciliary State of Texas, and its probate in Oklahoma having been based on its

probate in the State of Texas, that the Codicil was without effect in the State of Oklahoma. The cross-petitions of the Porters for damages and for re-collection of the estate being based upon the asserted validity of the Codicil, judgment was rendered against the Porters on their cross-petitions. From this judgment the Porters appealed to the Supreme Court of the State of Oklahoma.

In the Supreme Court of the State of Oklahoma the two pending causes were heard together. That Court affirmed the actions of the County Court and the District Court in the probate cause and affirmed the action of the District Court in the equity cause. The Porters, as petitioners herein, seek to have this court review these decisions of the Supreme Court of the State of Oklahoma.

The Issues.

The issues, insofar as they are involved in the Petition for Writ of Certiorari, are narrowed to a single question.—Did the Oklahoma courts, in according to the final judgment of the County Court of Gregg County, Texas, the effect of a final adjudication that the codicil to the Will of Murray Case Sells is invalid, violate the due process clause of the 14th Amendment to the Constitution of the United States?

ARGUMENT.

The Oklahoma Courts held that since the Codicil to Mr. Sells' Will was declared invalid by a court of competent jurisdiction in the state of his domicile, Texas, it thereby became invalid in Oklahoma. Its probate in Oklahoma was based solely upon its probate in the State of Texas. The Codicil was in no way proven in Oklahoma excepting by a certified copy of the Codicil and its probate in the State of Texas. The effect of the Codicil's having been declared invalid in Texas upon the ancillary probate of a copy thereof in Oklahoma based upon the probate of the original in Texas is a matter of state law and not open to review by this Court.

We take it to be axiomatic that a judgment of a court of competent jurisdiction of Texas is entitled to full faith and credit in the State of Oklahoma provided the Texas Court had jurisdiction of the subject matter and of the parties. We realize that a party litigant may not be deprived of his day in court by the Oklahoma Courts recognizing a judgment of a Texas court lacking jurisdiction. However, ordinarily an attack upon the judgment of a court of another state must be a direct attack and not a collateral attack. It was proven at the trial that the law of Texas is that the judgment of a court of competent jurisdiction of that State may not be attacked collaterally. This is likewise the law of the State of Oklahoma.

Terrell v. *Gotcher*, 197 Okl. 650, 174 P. 2d 229.

This is the general law of the land. In the case of *City of Owensboro* v. *Hardwicke*, 24 S. W. 2d 555 (Ky.), which is closely in point, a judgment refusing probate of a will, was

attacked in another proceeding. The court refused to consider such attack, stating simply at page 557:

> "The Circuit Court had jurisdiction of the will contest and its judgment is valid until vacated or reversed * * *. If it be assumed that the judgment is voidable, the fact remains that it was not subject to a collateral attack."

Since the judgment of the County Court of Gregg County, Texas, could not be attacked collaterally in Texas, it cannot be so attacked in Oklahoma.

However, even if the Oklahoma courts could have inquired in this collateral proceeding as to jurisdiction of the County Court of Gregg County, Texas, such inquiry could but have resulted in the decision that that court had jurisdiction. Insofar as jurisdiction of the subject matter is concerned there appears to be no contest but that the County Court of Gregg County, Texas, was a court of competent jurisdiction empowered to invalidate wills previously admitted to probate therein upon proper showing. Such court undoubtedly had jurisdiction of the proceedings brought to invalidate the probate of the Will and the Codicil in Texas. The Porters argue that since the Will was upheld, the County Court of Gregg County, Texas, had no jurisdiction to invalidate the Codicil since this could in no wise benefit the contestants. However, such is not the law.

Once the jurisdiction of a court has attached it will not be divested by subsequent events or the failure of the parties bringing the cause to obtain the relief asked for. In 21 C. J. S. at page 143, Courts, Sec. 93, appears the statement:

"As a general rule jurisdiction once acquired is not defeated by subsequent events, even though they are of such a character as would have prevented jurisdiction from attaching in the first instance."

Cases so holding are *Hinds* v. *Superior Court of Seminole Co.*, 39 P. 2d 530 (Okla.); *Cleveland* v. *Ward*, 285 S. W. 1063 (Tex.); and *Boyd* v. *Mara*, 284 S. W. 703, (Tex. Civ. App.).

In 30 C. J. S. at page 414, Equity, Sec. 67, it is stated:

"* * * it is a well settled rule that a court of equity which has obtained jurisdiction of the controversy on any ground, or for any purpose will retain such jurisdiction for the purpose of administering complete relief and doing entire justice with respect to the subject matter."

Citing *Vaughan* v. *John C. Winston & Co.*, 83 F. 2d 370, C. C. A. 10 (Okla.), affirming, 11 Fed. Supp. 954; *Magnolia Petroleum Co.* v. *Suits*, 43 F. 2d 280, C. C. A. 10 (Okla.); and *Cleveland* v. *Ward*, 285 S. W. 1063 (Tex.).

Further along, at page 419, the text continues:

"* * * The fact that necessity for the relief originally asked for may disappear pending the proceedings does not destroy the vested jurisdiction of the court to retain the case for complete disposition of all rights and obligations of the parties, and the court may retain jurisdiction despite the complainant's decision at the hearing not to ask for the relief originally sought * * *."

This same situation often comes up with regard to jurisdiction of the Federal Courts. In 35 C. J. S., at page 827, Federal Courts, Sec. 26, the text states:

"As a general rule, where the jurisdiction of a federal court has once attached it is not subject to be divested by subsequent events or extraneous matters."

Examples are: Reduction of the claim below the jurisdictional minimum, *Barnaby* v. *Baron C. Collier, Inc.*, 65 F. 2d 864, C. C. A. 8 (Neb.); Change of parties, *Saley* v. *Black Panther Oil & Gas Co.*, 280 Fed. 496, C. C. A. 10 (Okla.); Change of citizenship, doing away with diversity upon which jurisdiction was based, *Wichita Railway and Light Co.* v. *Public Utilities Company of the State of Kansas*, 260 U. S. 48.

Certainly the County Court of Gregg County, Texas, had the jurisdiction to entertain a suit by the heirs to set aside Mr. Sells' Will and the Codicil thereto. The fact that the Court concluded that the Will should not be set aside in nowise deprived it of jurisdiction to set aside the Codicil, even though such an action by the court would lend no support to the heirs' claim of inheritance.

The County Court of Gregg County, Texas, had jurisdiction of the subject matter.

We turn then to the question of jurisdiction of the parties. No question is raised but that the Will contest proceeding in the County Court of Gregg County, Texas, was regularly commenced as provided by the Texas law. Such proceedings are by application to annul the provisions of a will. Article 3433, Vernon's Texas Statutes. Article 3434, Vernon's Texas Statutes, provides the procedure with respect thereto.

> "Upon filing of such application the Clerk shall issue a citation for the executor or administrator to appear at a regular term of such Court, and answer such application. The substance of the application shall be stated in the citation * * *."

This Statute has been construed by the Texas courts and they have held that the Executor or Administrator is the only person upon whom the citation must be served. In the case of *Kramer* v. *Sommers*, 93 S. W. 2d 460, Texas Civil Appeals, the Court holds in the first paragraph of the syllabus:

> "Where suit was brought under statute authorizing attack on Will which has been probated, by which statute executor is made legal representative of all persons interested in Will, common-law rule that all interested persons must be made parties to suit held inapplicable, executor being only necessary party to the suit." (Rev. St. 1925, Arts. 3433-3435.)

In the body of the opinion the Court states:

> "The application filed in the county court was expressly authorized by the provisions of Articles 3433, 3434 and 3435, and in Article 3434 the executor or administrator is the only person named upon whom citation must be served. That was a special statutory procedure in which the executor was made the legal representative of all persons interested in the estate. *Lyons-Thomas Hardware Co.* v. *Perry Stove Mfg. Co.*, 88 Tex. 468, 27 S. W. 100. And the proceeding being statutory, there is no basis for application of the common-law rule that all persons whose interests are to be affected must be made parties to the suit. It is, therefore, clear that there was no lack of necessary parties. *Allardyce* v. *Hambleton*, (Tex. Civ. App.) 68 S. W. 834, 835; *Allardyce* v. *Hambleton*, 96 Tex. 30, 70 S. W. 76; *Anderson* v. *Menefee*, (Tex. Civ. App.) 174 S. W. 904 (writ denied); *Keller* v. *Corpus Christi*, 50 Tex. 614, 32 Am. Rep. 613; *Globe Newspaper Co.* v. *Walker*, 210 U. S. 356, 28 S. Ct. 726, 52 L. Ed. 1096; *Middleton Nat'l Bank* v. *Toledo, A. A. & N. M. R. Co.*, 197 U. S. 395, 25 S. Ct. 462, 49 L. Ed. 803; 1 Corpus Juris, Sec. 102, p. 989."

There is no contention made but that the citation was duly issued by the Clerk and duly served upon the Independent Executor. Thus, the necessary process was had and the only person necessary to be before the Court, the Independent Executor, was brought before the Court.

However, the joinder of parties did not stop at this point. Actually, all of the interested parties were represented at the trial of the cause in the County Court of Gregg County. The Independent Executor was present. The Colleges were present. The indefinite beneficiaries of the charitable trusts set up in the Will and the Codicil were present through the Attorneys General of the States of Texas, Oklahoma and Arkansas, who are the persons empowered by law to represent such beneficiaries, and such trusts.

See Note 62 A. L. R. 881, Subdivision II at page 882, and Supplementary Note 124 A. L. R. 1237, Subdivision II, at page 1238.

If, as the Porters maintain, they have some standing over and beyond that of simply attorneys in the case, they were present before the Court in the person of John W. Porter, Sr. Each of the parties acquiesced in the judgment rendered by the County Court of Gregg County, Texas, invalidating and annulling the Codicil.

The Court had full jurisdiction of the parties.

It follows then that the judgment of the County Court of Gregg County, Texas, was rendered in all proper accord with recognized due process of law. It had jurisdic-

tion of the subject matter and of the parties, and the judgment was rendered as the result of a trial had upon regular setting with all parties present.

Conclusion.

Far from this being a case in which this Court should exercise its discretionary power to grant a writ of certiorari, it is a case in which, if this Court were to grant such a writ of certiorari, it would have to find that there has been no violation of the Constitution or the laws of the United States. The petition for writ of certiorari should be denied.

Respectfully submitted,

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